Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

CAFÉ EROTICA, INC.,

Petitioner,

v.

PEACH COUNTY, GEORGIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THIS COURT HAS FORMULATED AND ANNOUNCED A CLEARLY DEFINED STANDARD FOR THE REVIEW OF ANY LEGISLATIVE ENACTMENT WHICH SEEKS TO REGULATE ADULT ENTERTAINMENT AND ENTERTAINERS.

2. WHETHER THE CONCEPT OF "SECONDARY EFFECTS" IS NO MORE THAN A JUDICIAL FICTION SUPPORTED AT BEST BY "STUDIES" AND "EVIDENCE" WHICH WOULD NOT BE ADMISSIBLE IN THE MOST MUNDANE PROPERTY DAMAGE OR PERSONAL INJURY CASE.

3. WHETHER THE STATE AND FEDERAL COURTS OF THESE UNITED STATES ARE AT LIBERTY TO IGNORE THE TRUTH IN PROCEEDINGS CONCERNING THE FIRST AMENDMENT.

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

Café Erotica, Inc., Peach County Georgia, The Board of Commissioner of Peach County, Georgia, Charles Bartlett, Matt Mullins, Dr. Ira Hicks, Jimmy Walker, and Anna Lumpkin are the parties herein.

The petitioner has no parent company and no publicly held company owns 10% or more of its stock.

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Petitioner respectfully prays that writ of certiorari issue to review the judgment of the Supreme Court of Georgia in the matter of *Café Erotica Inc., d/b/a "Café Erotica" v. Peach County, Georgia, et al.*, 2000 W.L. 155712, dated January 18, 2000, and that Court's denial of Petitioner's Motion for Reconsideration dated February 11, 2000.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia appears at App. A at 1a. The underlying opinion of the Superior Court of Peach County appears at App. B at 7a.

STATEMENT OF JURISDICTION

The Supreme Court of Georgia entered its opinion on January 18, 2000. Petitioner filed a timely Motion for Reconsideration which was denied by Order of February 11, 2000. App. C at 11a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS
UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech. . . ."

Amendment IV section 1

No State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CODE
42 U.S.C.A. § 1983

"Every person who, under color of any stature, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."

PEACH COUNTY CODE OF ORDINANCES

The Peach County Adult Entertainment Ordinance is reproduced at App. D at 12a.

STATEMENT OF THE CASE

Appellant brought this action in the Superior Court of Peach County Georgia to enjoin the enforcement of an ordinance which seeks to regulate and license adult entertainment establishments. The County and the Appellant filed Motions for Summary Judgment. By order of January 15, 1999 [R-2182] the Trial Court granted the County's Motion for Summary Judgment and denied the Motion of the Appellant. A timely notice of Appeal was filed. The Supreme Court of Georgia entered an opinion upholding the ordinance and affirming the decision of the trial Court on January 18, 2000. A Motion for Reconsideration was denied by order of February 11, 2000.

A. Facts Of The Case

The following facts were uncontested for purposes of the Motions for Summary Judgment submitted to the Peach County Superior Court below and the decision of the Supreme Court of Georgia.

Café Erotica has been providing adult entertainment in the form of nude and partially nude dancers since 1992. A previous ordinance attempting to regulate and control "adult entertainment" was declared unconstitutional because the Peach County Commission failed to consider and rely upon "evidence of adverse secondary effects" i.e. that adult entertainment as defined by the ordinance causes "adverse secondary effects." In a Commission Meeting of March 12, 1996 County Attorney Adams recommended a moratorium on the issuance of beer licenses "***to have time to obtain a constitutional ordinance*** *to eliminate nude dancing* ***from Peach County.***" (Plaintiff's exhibit # 3, Peach County Commission Minutes) [R-469, 1795]. A hearing was scheduled and advertised for May 7,1996. (Plaintiff's Exhibit #10 & #11)[R-469,R-573].

1. The Record

Some Commissioners had been provided photocopies of some information (Bartlett depo [R-1296] p.9-1.6). However that information was not made a part of the official record of the commission nor tendered into evidence in any fashion at

the hearing of May 7, 1996 (Hearing transcript [R-189], Depo. of M. Willis [R-1006] p.21-l.10). The actual material provided to the Commissioners has not been tendered into evidence by the County but is said to consist of: a) a Photocopy of what purports to be a study conducted in the City of Austin, Texas. (Plaintiffs exhibit 17 [R-1343]); b) An anonymous "Finding of Fact: Austin, Texas" (Plaintiff's Exhibit #19 [R-1345]); c) a Photocopy of what purports to be a *Final Report to the City of Garden Grove*; d) an anonymous comment purporting to summarize "studies and survey" from several cities. (Plaintiff exhibit #20 [R-1346]) and e) A three page excerpt from some unidentified hearing by Major Robert Allen. (Plaintiff exhibit #20 [R-1346]).

Testimony was given by Claire Booth a recent graduate of the University of Georgia and employee of the Regional Development Council; Michael McDaniel, an employee of the GBI; Sheriff Johnnie Becham; and a Major Allen of the Macon Police Department.

2. The Ordinance

The preamble to the Ordinance, Plaintiffs exhibit #1 [R-1326], purports to find as a result of this hearing the following:

a) That there are "the *well known and self-evident* [emphasis added] conditions and secondary effects attendant to the commercial exploitation of human sexuality;"

b) That "Public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in establishments offering live nude entertainment or 'adult entertainment' (whether such alcoholic beverages are sold on the premises or not) begets criminal behavior and tends to create undesirable community conditions;"

c) That "Among the acts of criminal behavior found to be associated with the commercial combination of live nudity and alcohol, live commercial nudity in general, and cinematographic or videographic adult entertainment are disorderly conduct,

prostitution, public solicitation, public indecency, drug use and drug trafficking;"

d) That "Among the undesirable community conditions identified in other communities with the commercial combination of live nudity and alcohol, live commercial nudity in general, and cinematographic or videographic adult entertainment are depression of property values, and acceleration of community blight in the surrounding neighborhood, increased allocation of an expenditure for law enforcement personnel to preserve law and order, and increased burden on the judicial system as a consequence of the criminal behavior herein above described;

e) That "The board of Commissioners finds it reasonable to believe that some or all of these conditions will result in Peach County, as well;"

f) That "other forms of adult entertainment including, but not limited to, adult book stores, peep shows, adult theaters and massage parlors have an adverse effect upon the quality of life in surrounding communities;"

g) That "licensing and regulation [of adult entertainment] are necessary for any adult entertainment;" and

h) That the "regulations promote the public welfare by furthering legitimate public and governmental interest, including but not limited to, reducing criminal activity and protecting against or eliminating undesirable community conditions."

3. Ms. Booth

Ms. Booth was asked by the county attorneys to summarize the Austin and Garden Grove papers, not to look at them critically (Booth depo. [R-1066] p.15, -l.10) She was critical of the Austin study because the researchers hadn't sought input from homeowners (Booth Depo. p.15-l.12) as less statistically accurate and "limited" (p.25-l.24). She agrees that the "quasi experimental" design of the studies means "half experimental, not quite experimental, not really subject to strict scientific design." (Booth Depo. p.18-l.14). Mrs. Booth agreed that the authors of the Garden Grove paper had stated that they couldn't

really draw any conclusions from the date from the police reports because they didn't have any data from the same area before the adult businesses went into operation (Booth Depo. p.18-l.18). Mrs. Booth agreed that the authors of the Garden Grove paper state on page three that "the relationship between density and crime cannot be determined." (Booth depo. p.20-l.16)

The information she gave concerning "studies" other than Austin and Garden Grove were just summaries of the other studies she found summarized in Austin (Booth Depo. p.22-l.19). She never saw the other studies.

Her economic impact study was based on the "assumption" that a business seeking a location in Peach County would be "offended or put off" by the presence of an adult use (Booth Depo. p.28-l.3). Her testimony was only meant to convey the impact of losing a business for whatever reason. She didn't give a reason for their leaving (p.30-l.23 through p.31-l.6). She could name no business which had declined to locate in Peach County because of Café Erotica or Neon Cowboy, was unable to say how many businesses actually opened in Peach County since Café Erotica and Neon Cowboy opened and in fact knew of at least one new business being built at Exit 45 where Café Erotica and Neon Cowboy are located (Booth Depo. p.28 & 29). Ms. Booth was uncertain how her testimony concerning the Fall Line Freeway was relevant to Café Erotica (Booth Depo. p.29-l.7).

4. GBI Agent McDaniel

At deposition [R-1099] Michael McDaniel, an agent for the GBI whose job it is to gather intelligence on criminal activity in the middle Georgia area, testified that he had been aware of Café Erotica and Neon Cowboy since they opened [in 1992]. He had gotten complaints about drug dealers going to the clubs. He further testified that he "got complaints on all of them that certain drug dealers are going to this nightclub or that nightclub or whether it be Café Erotica. We get complaints on all of them (Country nightclubs or any of the other ones)." (McDaniel Depo. [R-1099] p.11-l.6). By complaints he means that "somebody

said that somebody had sold some drugs at Café Erotica" and they "documented a report" (McDaniel Depo. p.13-l.13).

Agent McDaniel agrees that since 1992 he is aware of no arrest at Café Erotica, Neon Cowboy or Teasers (in Warner Robbins) for drugs either selling or buying (McDaniel Depo. p.15-l.7; p.17-l.18; p.18-l.14). Since 1992 he is aware of no arrest of any employee or patron for any sex related crimes that took place at Café Erotica or Neon Cowboy (McDaniel Depo. p.18-l.24). The only actual call about either club he can be specific about is a call from the manager of Neon Cowboy asking him to investigate a customer they had caught selling drugs and had "kicked him out" (McDaniel Depo. p.22-l0).

McDaniel personal opinion expressed to the commission is based on "two or three" arrest since 1992 of drug dealers arrested for crimes unrelated to Café Erotica, Neon Cowboy, or Teasers, who confessed they had "hung out" at a nude club and lived with a dancer at some time (McDaniel Depo. p.8-l2).

5. Sheriff Becham

Sheriff Becham has been Sheriff of Peach County since 1981 (Becham depo. [R-1127] p.8-l.11). Susan Cole and Charles Adams, attorneys for the County, visited with Sheriff Becham just two hours before the hearing to "talk with [him] about the hearing." (Becham depo. p.5-l.1) "[T]hey wanted to come down and discuss the — whatever they was going to do before the hearing." (p.5-l.22). The sheriff provided the Commission with a computer printout of the calls dispatched to several businesses at exit 46 on I-75 which had been requested by some private parties. He presented the list at the hearing but the list does not appear in the officials records of the hearing nor was it provided to the Commissioners. (Becham Depo. p.6l-l.10; Ba p.13-l.10).

When the Sheriff took office in 1981 he had eight patrolmen and four dispatchers. (Becham Depo. p.8-l.16) From 1981 until 1997 the population of Peach County increased from Nineteen Thousand to Twenty One Thousand (Becham Depo. p.11-l.14). By the early 1990's the Sheriffs office had 46 employees and the number has been the same for the past seven or eight years

(Becham depo. p.10). From 1981 until 1997 the number of deputies on regular patrol at any given moment has remained the same. Drug activity picked up about 1986 and has remained about the same since (Becham depo. pp.18&19). Sheriff Becham has never assigned any deputy to watch over Café Erotica or the regularly visit Café Erotica on any regular interval (Becham Depo. p.17-l.25; p.26-l.5). His officers check on Café Erotica "just like any other business." (Becham Depo. p.18-l.5; p.26-l.5). Sheriff Becham has never mentioned Café Erotica or Neon Cowboy in any budget proposal or request as a reason for the need for increased spending (Becham Depo. p.18-l.7). Many of the calls listed on the dispatch log were calls from the Café Erotica itself asking for assistance. "They [the club managers] have a reputation of trying to police the outside and the inside." (Becham Depo. p.20-l.25).

The Sheriff's testimony at the hearing concerning Prostitution was based on one anonymous call that one of the dancers was eating at a nearby Waffle House and letting it be know that she was available for prostitution (Becham Depo. p.34-l.16). Other than that one phone call he has nothing that he would "stand on" concerning prostitution. (Becham Depo. p.35-l.6). Sheriff Becham is aware of no arrest for prostitution ever in Peach County (Becham depo. p.36-l.6 & l.14). There have been no arrest or convictions for masturbation for hire or any other sex act at Café Erotica or Neon Cowboy (Becham Depo. p.37-l.16).

In recent years Sheriff's deputies have made two or three misdemeanor drug arrests per week and sometimes one or two per day. (Becham Depo. p.31-l.13). Sheriff's deputies run undercover drug operations every day and make significant arrests every week (Becham Depo. p.31-l.21). Since 1992 there have been no arrests of any waitress for selling drugs at Café Erotica or Neon Cowboy (Becham Depo. p.29-l.24). Since 1992 there have been no arrests of any dancer for selling drugs at Café Erotica or Neon Cowboy (Becham Depo. p.30-l.6). Since 1992 there have been no arrests of any dancer or waitress for

possession of drugs at Café Erotica or Neon Cowboy, in the parking lot, or in the motel adjacent to Café Erotica. (Becham Depo. p.30-l.6 through l.17). Two undercover operations have failed to reveal any drug activity or result in any arrests (Becham Depo. p. 30 &31). Since 1992 there have been no arrests of any waitress for selling drugs at Café Erotica or Neon Cowboy (Becham depo. p.29-l.24)

When the Sheriff testified at the hearing that the number of calls to the "area" had increased he had not examined the actual number of calls to dispatch for that "area" before Café Erotica and Neon Cowboy went into business (Becham Depo. p.43-l.18). His testimony was based on the fact that "*in [his] heart*" (p.24-l.12) he feels that "**Naturally** when you have something going from a café, regular food place, and you get involved in alcohol an nude dancing, your calls are gonna pick up, either from domestic problems, from drug problems. Its just a natural thing, I don't know why, it's **just a natural thing**."

6. Major Allen Of Macon

At the Hearing of May 7,1996 Plaintiffs exhibit no. 20 [R-1346] was presented as information from a Major Robert Allen of the Macon Police Department. Major Allen has been with the Macon Police Department since 1971. Major Allen identified Plaintiffs exhibit # 20 as a summary that was prepared for him by someone in the office of a Mr. Hale Almand, City Attorney for the City of Macon. (Allen Depo. [R-1048] p.7-l.23). Plaintiffs exhibit no. 20 was prepared and Maj. Allen testimony was given to the Macon City Council in 1993 (Allen Depo. p.9-l.16).

At the time of the preparation of Plaintiff's exhibit no. 20 and Major Allen's testimony there had been only one adult business in Macon since 1971, a lingerie club called Show Girls (Allen Depo. p.9-l.12; p.10-l.7). Show Girls was only open three weeks to a month (Allen Depo. p.9-l.25).

Major Allen's testimony regarding prostitution in the early seventies was unrelated to any nude club, lingerie club, adult book store, movie house or any other adult uses (Allen Depo.

p.11-l.11). Major Allen's testimony about an increased murder rate in 1992 concerned a period of time when there were no adult uses present in Macon (Allen Depo. p.9-l.12; p.10-l.7). The breakdown in moral values to which Major Allen attributed the rise in murder rate was not associated with any adult use in Macon (Allen Depo. p.12-l.10). Major Allen's report concerning officer Padgett from Atlanta was not based on any statistics or numbers other than the thirdhand hearsay that four of twenty four nude clubs had lost their business license for undisclosed reasons (Allen Depo. p.13-l.3). Major Allen's report concerning Chief Freeman from Charleston was not based on any statistics or numbers.

7. Evidence From The Commissioners

In 1996 Mr. Charles Bartlett was the Chairman of the Peach County Commission (Bartlett Depo. [Ba] [R-1296] p.3-l.24). Mr. Bartlett did not participate in drafting the language of the Ordinance, Plaintiff's Exhibit #1 (Ba p.6-l.11).

Before the hearing Chairman Bartlett believes he was told that "there were studies that had been done that showed that these are two things that should not be mixed." (Ba p.8-l.18). Mr. Barlett passes Café Erotica three or four times every month (Ba p.23-l.6). Mr. Bartlett is unaware of any change in the character and makeup of the area around Café Erotica after it opened as an adult club (Ba p.26-l.15).

Mr. Bartlett is unaware of any request by the Sheriff for more money to patrol Café Erotica and Neon Cowboy (Ba p.27-l.4). In acting on the ordinance Mr. Bartlett never came to any conclusion concerning whether the value of land around Café Erotica had been affected by it use as an adult entertainment establishment (Ba p.27-l.21).

Mr. Matthew Mullis was a member of the Peach County Commission in 1996 (Mullis[Mu][R-1264] p.5-l.6). Mr. Mullis did not participate in drafting the Ordinance, Plaintiff's exhibit #1 (Mu p.12-l.21). Mr. Mullis reached no conclusion about the effect of Café Erotica on the value of land and businesses (Mu p.26-l.11).

Mrs. Anna Lumpkin was a member of the Peach County Commission in 1996 (Lumpkin depo. [Lu] [R-1173] p.3-l.23). Mrs. Allen remembers receiving the notebook of materials at the hearing (Lu p.7-l.3). Mrs. Lumpkin stated that no information about property values in Peach County was provided to them (Lu p.12-l.1). Mrs. Lumpkin drives by Café Erotica and Neon Cowboy "frequently," "once or twice a week." (Lu p.13-l.11). She is unable to describe any changes that have occurred since Café Erotica and Neon Cowboy went into business (Lu p.14-l.12).

Dr. Ira Hicks, Jr. was member of the Peach County Commission in 1996 (Hicks [Hi] [R-1235] p.4-l.11). Dr. Hicks did not participate in the drafting of the Ordinance (Hi p.14-l.1). Dr. Hicks is familiar with the locations for Café Erotica and Neon Cowboy, and passes that way "six or eight times per month" (Hi p.17-l.14). With the exception of Café Erotica and Neon Cowboy the businesses that are in the area now are pretty much the same businesses that were there before Café Erotica and Neon Cowboy became adult entertainment establishments (Hi p.17-l.21). Dr. Jackson doesn't recall receiving any specific information about property values in and around Café Erotica and Neon Cowboy (Hi p.21-l.6) and reached no conclusion concerning whether property values had risen, fallen or remained steady (Hi p.22-l.19). Dr. Jackson remembers that most of the complaints and presentations to the Board of Commissioners were from people who were opposed to adult entertainment on moral grounds (Hi p.28-l.2).

Mr. Jimmy Walker was a member of the Board of Commissioners in 1996 (Walker Depo. [Wa] [R-1190] p.3-l.21). Mr. Walker doesn't remember anyone asking Mr. McDaniel or Sheriff Becham if they had made any arrest actually at Café Erotica or Neon Cowboy, of any employee of Café Erotica or Neon Cowboy, or for any incident which occurred at Café Erotica or Neon Cowboy (Wa p.30-l.22). Mr. Walker doesn't recall any information being submitted to the commission about property values around Café Erotica and Neon Cowboy (Wa p.40-l.3).

B. Expert Witness Bruce McLaughlin

"NO REASONABLE LAND USE PLANNER COULD RELY ON THE EVIDENCE PRESENTED TO THE PEACH COUNTY BOARD OF COMMISSIONERS."

Bruce B. McLaughlin, a Consultant in land use planning to local governments in the states of Florida, and Georgia has a Masters of Science degree in Urban and Regional Planning and has been qualified as an expert witness with regard to land use planning and the existence of the alleged adverse secondary effects of Adult Uses. After an examination of all of the material, information and testimony available to the Peach County Commission Mr. McLaughlin, testifying by affidavit, concluded that The Peach County Adult Use Ordinance:

a) does not further *any* governmental interest, let alone an important governmental interest;

b) is, at most, based on mere legislative preferences or beliefs;

c) is not supported by any *justification*, let alone sufficient justification to exclude a broad category of protected expression;

d) Further, in the absence of any true predicate for the Ordinance, from a factual standpoint, the sole purpose of the Ordinance is to suppress speech;

e) Finally, the restriction imposed on speech is totally *unnecessary* to further any governmental interest.

Mr. McLaughlin has further testified that the information in the documents presented to the Peach County Board of Commissioners does not show that the harm it perceives is real; does not show that the harm will be alleviated in any material way by the Ordinance at issue and does not even rise to the level of speculation or innuendo.

C. The Myth Of Pernicious Secondary Effects.

Mr. McLaughlin testifies that in the several years since he was first asked to examine the "evidence" upon which cities, counties and states have purported to find there to exists adverse

or pernicious secondary effects, he has examined all of the available "studies" cited in reported cases except the study purportedly done in the City (County?) of Los Angeles, California, which he has been unable to locate. He has also conducted and participated in several studies of the impact of existing "adult uses" on crime rates, property values, and the character of the neighborhood. Just as there is no evidence which would support a finding by any reasonable land use planner of any detrimental effects caused by the adult uses at Café Erotica and Neon Cowboy in Peach County, Georgia, there is *no evidence available from any of the reported state or federal cases cited in his affidavit by which a reasonable land use planner could conclude that adult uses cause an increase in crime rate, a decrease in property values, or a decline in the character of the neighborhood.*

In his opinion, based on his experience, training, first hand research , four valid studies and the findings of those "studies" cited in the existing case law, adult uses in fact do not cause a decrease in property values, an increase in the crime rate or cause the area around them, i.e. the neighborhood to change in character. *It is his opinion the existence of "adverse or pernicious secondary effects" of adult uses is nothing more than a myth which grew out of the holding in Young v. American Mini Theaters but does not survive even minimal scientific scrutiny.*

REASONS FOR GRANTING THE WRIT

I. AS YET THIS COURT HAS ANNOUNCED NO CLEARLY DEFINED STANDARD FOR THE REVIEW OF A LEGISLATIVE ENACTMENT WHICH SEEKS TO REGULATE ADULT ENTERTAINMENT.

This Court should take this opportunity to announce a clear and definitive standard for action by a state or federal trial court faced with a challenge to a legislative enactment which seeks to prohibit or control adult entertainment. To date neither this Court, the Eleventh Circuit Court of Appeals, nor the Georgia

Supreme Court has clearly articulated the standard to be applied at the trial court level.

In *Pap's A.M.* Justice O'Conner writes that "the evidentiary standard described in Renton controls here." The Georgia Supreme Court also purported to be applying the Renton Standard to this case. The "standard" as enunciated in Renton is that a legislative body may "demonstrate" secondary effects by producing "evidence" which is "reasonably believed to be relevant to the problem that the city addresses." The phrase "reasonable belief" is not defined.

Although the list is certainly subject to improvement by sharper intellects, the following seem to represent the extent of the possible standards.

A. THE ALICE THROUGH THE LOOKING GLASS STANDARD:

Negative secondary effects exist as a legal fiction and are hereby established as a matter of law whether or not such effects actually exist in the real world. No amount of evidence at the hearing or in court to the contrary will be considered.

B. THE PURELY PERSONAL SUBJECTIVE STANDARD OR "BOXER STANDARD." [With apologies to Paul Simon]

As long as legislators are willing to swear that they "reasonably relied" on some "studies" and "evidence" their enactments are constitutional; a) regardless of whether the studies actually exist, are even arguably valid, or are fraudulent and self serving pseudo or junk science; and b) regardless of whether the "evidence" presented at the hearing was objectively worthless or even intentionally false. Presentation at trial of evidence which would lead most courts to conclude that such effects do not exist will not overcome a legislators affidavit stating that they "reasonably relied" on the evidence in voting for the prohibition or regulation.

"A man hears what he wants to hear and disregards the rest." Paul Simon, *The Boxer*.

C. THE ARGUABLY "OBJECTIVELY REASONABLE" STANDARD

A trial court must apply at least a minimally objective standard that requires a judicial examination of the purported "studies" and "evidence" to determine whether the Court can rule that it is at least arguable that reliance by legislators on the particular "studies" or "evidence" can be held to be objectively "reasonable."

D. THE OBJECTIVELY REASONABLE STANDARD

A trial court must examine the "studies" and "evidence" to determine whether a reasonable legislator could have concluded that negative secondary effects are a reality.

E. THE PROBATIVE EVIDENCE STANDARD

A trial court must determine by the preponderance of competent, admissible and probative evidence presented at trial whether negative secondary effects actually exist.

II. UNLIKE THE PETITIONER IN PAP'S A.M., CAFÉ EROTICA MADE A STRONG EVIDENTIARY CHALLENGE IN THE COURTS BELOW.

In upholding the Erie Ordinance Justice O'Conner points out that "Kandyland had never challenged the council's findings or cast any doubt on the validity of those findings." "In the absence of any reason to doubt it, the city's expert judgment should be credited." In his dissent Justice Souter points out that the plurality's reliance on the administrative analogy for "legislative facts" is good only "in the absence of evidentiary challenge."

When Justice Souter is added to the four justice's represented by the opinion of Justice O'Conner, the one majority holding of Pap's A.M. is that an opponent of a legislative

enactment may mount an evidentiary challenge to the "facts" alleged to support the restrictions.

As demonstrated in the following sections this Court should take up this case to allow the strong factual challenge to the Myth of Secondary Effects to be heard. To date no court has entertained an evidentiary hearing in this or any other case.

A. PETITIONER PRESENTED EVIDENCE AND EXPERT TESTIMONY THAT SECONDARY EFFECTS DO NOT EXIST.

Petitioner produced by affidavit the testimony of Bruce McLaughlin, a land use planning Consultant and local government Consultant in the States of Florida, Georgia and elsewhere in the United States. Mr. McLaughlin has a Masters of Science degree in Urban and Regional Planning and is a member of the American Institute of Certified Planners and of the Canadian Institute of Planners. His credentials as a land use planner have been accepted by local governments on many occasions and he has been qualified as an expert witness.

The use of zoning and other regulations to prevent or control the extent of any supposed impact on the value and use of surrounding properties is **a matter of land use and land use regulation**. When a government seeks to prohibit, control or regulate speech because of the supposed **impact of the establishment itself** on surrounding properties and governmental services, **the regulation is a land use regulation**. The issues raised are **land use issues**.

Mr. McLaughlin has often been retained to research zoning and other ordinances or statutes seeking to regulate Adult Uses; to conduct an independent analysis of those enactments, and to provide expert testimony with respect to:

a. the nature of the legislation;

b. the methods employed in its enactment;

c. whether or not the legislation has a reasonable scientifically demonstrable planning predicate, *i.e.* whether the harm which the enactment purports to

address actually exists; whether the harm is causally related to the activity sought to be regulated, and whether the regulations enacted can reasonably be expected to have significant impact on the supposed harm. (With respect to Adult Uses in general and the subject legislation in particular, this part of my work focuses on whether or not there is factual, evidentiary support for the allegations that there are adverse secondary effects associated with adult cabarets such as those of Plaintiff.)

d. whether the legislation is factually arbitrary and capricious either on its face, or as applied to particular properties; and

e. whether the legislation provides adequate alternative avenues of communication for Adult Uses.

In the course of each employment he has conducted a review of the judicial history and development of the concept of "adverse secondary effects" and to evaluate the "evidence" presented in each case to support the existence of "secondary effects."

Of particular interest is his testimony regarding the two cases most relied upon by proponents of the supposed "secondary effects"; i.e., *Young v. American Mini Theaters, Inc.* and *Playtime Theatre v. City of Renton*. Justice O'Conner, in *Pap's A.M.*, speaks of the "evidentiary foundation set forth in Renton and American Mini Theatres" as if a judicial hearing and determination of the actual existence of these "secondary effects" had taken place.

Mr. McLaughlin testified that he had reviewed the record before the Court in *Young v. American Mini Theaters, Inc.*, and found it "difficult to imagine how the entire concept of 'adverse secondary effects' of adult uses became accepted as 'fact'."

B. PETITIONER PRESENTED EVIDENCE AND ARGUMENT THAT IN NO CASE, EITHER FEDERAL OR STATE, HAD A FINDER OF FACT HEARD EVIDENCE AND CONCLUDED THAT SECONDARY EFFECTS ACTUALLY EXIST.

In Section 3 of the opinion of January 18, 2000 the Supreme Court of Georgia misconstrues Petitioners third enumeration of error as "Café Erotica contends that the trial court erred in holding that an important governmental interest was threatened because there was no evidence that Peach County had experienced any of the negative effects it believed to be associated with adult entertainment establishments."

Petitioner's contention is that there is no evidence of negative secondary effects in Peach County or in any other locale or jurisdiction. According to the court records the City of Detroit conducted no empirical studies, nor had any evidence whatsoever to support its assertion to the District Court that Adult Uses cause unique adverse secondary effects. The only "evidence" produced were the self-elected concerns of residents or businessmen in the vicinity of some of the City's new Adult Uses. The focus of the comments about the alleged adverse secondary effects was on non-sexually oriented facilities, including pool halls, flop houses, shelters and motels, as well as secondhand stores and elderly housing in a downtown area. Incorporation of sexually oriented businesses into this category was, at most, incidental. The sponsoring council member, Ravitz, introduced an affidavit claiming that adult uses and elderly housing would increase crime, decrease property values and destroy the character of the neighborhood. This analysis was a paraphrase of his attack ten years earlier on legislation designed to desegregate racially segregated neighborhoods. Ravitz argued in a letter to the counsel that integration would increase crime, decrease property values and destroy the character of the neighborhood.

Unfortunately, the Plaintiffs in *Young* were focused on the issue of the impact of the regulations in the context of the First

Amendment rather than on the allegations of adverse secondary effects and failed to mount any challenge to the supposed "evidence" of the supposed secondary effects. No objection was made to the admissibility of the documents, or to the admissibility of the affidavits. The Plaintiffs did not argue that the evidence was insufficient to support a finding of "secondary effects" or to carry the City's Burden of persuasion.

When the case reached the Supreme Court of the United States, the majority of the justices emphasized Detroit's interest in preserving the character of its neighborhoods by regulating the use of land. According to Mr. McLaughlin's opinion

> the City of Detroit, with some help from the Plaintiffs, perpetrated a fraud on the Courts and the People of the United States with its allegation of adverse secondary effects unique to Adult Uses. There is not one iota, one scintilla, of evidence in the Detroit record that supports the contention that Adult Uses cause unique adverse secondary effects. There is nothing in the Detroit record (a full review of which is found in Exhibit E to this my Affidavit, on which a reasonable and prudent planner or local government official could reasonably rely or believe in support of the contention that Adult Uses cause adverse secondary effects that are distinct from the effects of any commercial use. The result was that the City of Detroit was allowed to control, regulate and restrict First Amendment expression to prevent a harm that doesn't actually exist, hence the myth of secondary effects was born.

In *Playtime Theaters v. City of Renton*, 475 U.S. 41, 106 S. Ct. 925 (1986) the City of Renton having no adult uses at the time purported to rely on a study that had been done by the City of Kent, Washington. The Kent, Washington "study" was subsequently cited in the opinion in *Northend Cinema, Inc. v. Seattle*, 90 Wash. 2d 709, 585 P.2d 1153 (1978) as if the trial court had entertained evidence on disputed facts and made

judicial findings. In a later case when the author of the Kent, Washington "study" was deposed he admitted to actually reaching the conclusion that **"he observed no demonstrated impact on value of property around the theater area' during the years when the Ridgemont showed adult movies. He stated that sales near the Ridgemont were 'no different per square foot than comparable property several blocks away**."

After an exhaustive review of state and federal cases regarding the supposed "adverse or pernicious secondary effects" Mr. McLaughlin concludes, "In summary, the Supreme Court's cases dealing with Adult Uses rely for the allegation that Adult Uses cause unique adverse secondary effects, primarily on the fraud perpetrated by the City of Detroit in *Young* and the now impeached allegations of *Renton*."

> [T]his incestuous interweaving of findings does not give rise to an evidentiary finding supporting the contention that Adult Uses cause unique adverse secondary effects. In fact, **any** review of the relevant evidence compels the opposite result — that there is not one iota, one scintilla of evidence to support the proposition that Adult Uses cause secondary effects different than those of generic commercial uses.

The existence of the Myth is evident in Justice Souter's concurring opinion in *Barnes, infra*. Justice Souter in writing only for himself writes as if several courts have held full hearings and have established as judicial fact the existence of "secondary effects." As Justice Souter has now pointed out in his dissent in *Paps A.M. tdba "Kandyland"* "the evidentiary question was never decided (or apparently, argued) below, nor was the issue fairly joined before this Court." The truth is that no opinion can be found which reflects a full evidentiary hearing on this so called fact.

III. THE SUPREME COURT OF GEORGIA WAS UNABLE TO FORMULATE A CLEAR STANDARD FOR THE TRIAL COURT

The Supreme Court of Georgia erroneously states in the Opinion that the trial court employed a "reasonable belief" standard in scrutinizing the studies Peach County relied upon in enacting the ordinance." **Yet the record clearly demonstrates that the Trial Court did not "scrutinize" the studies at all.** The trial court simply accepted the affidavit statements that each Commissioner "reasonably believed" the studies to support their actions. It is unclear in the Opinion whether the standard applied by the Supreme Court is the *Alice Through the Looking Glass standard, The Boxer standard , the Arguably Objectively Reasonable standard or the Objectively Reasonable standard*

Under the *Alice Through the Looking Glass Standard* or *The Boxer Standard* it doesn't matter if the studies are true or false and it doesn't matter whether the testimony and other evidence received is true or false. Under *Alice Through the Looking Glass* there are no questions to be asked. Under *The Boxer* the only question to be asked after a legislative enactment is whether the legislators "believed" the evidence at the time and believed that certain conclusions could be drawn. Under this subjective test the only inquiry is whether or not the legislators "believed". This line of reasoning and this test would foreclose any judicial inquiry into whether the "evidence" was in the least way credible and whether the conclusions drawn were in any scientific or logical way connected to the "evidence."

If, on the other hand, either an *Arguably "Objectively Reasonable"* or an *Objectively Reasonable* standard was the intention of the Court in the opinion, then the issue is again squarely raised: **who decides whether the belief was reasonable**; and how can this be done without an examination of the evidence presented for content and credibility? The Commission recites the names of several reports and recites that it is reasonable to conclude from these reports that adult

entertainment causes harmful secondary effects. What do we know about these reports? Nothing. If the Commission had been presented with a report compiled by three fourth graders after conducting a survey of second and third graders which concluded that adult entertainment produces harmful effects was that decision reasonable? Could the commission take away fundamental rights based on bogus reports simply because they believed or personally agreed with the result of the survey and are willing to state in an affidavit that the conclusions are reasonable?

Whether a City, County or State is required to establish the facts by a preponderance of the evidence as urged by the Petitioner or is required only to establish that the legislators acted reasonably when they found certain facts to be true, requires an examination of the information available to the legislative body and a judicial determination of the relevance and credibility of that information.

This Court invalidated California's attempt to curtail advertising because there were "no findings of fact" that price advertising will significantly advance the state's interest, *44 Liquormart*, 517 U.S. at 505. Justice Souter writes in *Pap's A.M.* that "intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed." No such findings have been made in this case. The trial court clearly applied either the *Alice Through the Looking Glass Standard* or *The Boxer Standard* and made no inquiry as to either arguable or actual objective reasonableness.

IV. THE "STUDIES" AND "EVIDENCE" RELIED ON BY THE COUNTY WOULD NOT BE ADMISSIBLE IN THE TRIAL OF ANY OTHER KIND OF CASE.

The blindfold on Themis, Lady Justice, represents a blindness to the different stations in life of those who come to court, not a blindness to the real world. First Amendment rights are being curtailed based on "studies" which have never been

subjected to judicial scrutiny and for the most part not even identified or named in the opinions of this Court. Even in *Paps A.M.* the court speaks of reliance on anonymous "studies from other jurisdictions."

What members of this Court have seen the so called studies? If the members of this Court are relying on the trial bench to have ruled that the studies pass muster, what members can point to an order in which a state or federal judge in Georgia or any state has taken a critical look at the studies to see if they pass even minimal scientific or expert opinion standards?

Not only have there been no critical review of the "studies from other jurisdictions," the studies aren't even named in most opinions. The opinion or scientific evidence relied on by this Court in *Barnes, Paps* and *Renton* would not be admitted in even the most mundane personal injury or property damage action.

The "evidence" given by Sheriff Becham and Agent McDaniel would likely be stricken after cross examination because of their absolute inability to provide and factual basis for their generalizations. To the extent that their testimony could be characterized as "expert testimony" neither was or could be qualified as an expert on the impact of adult entertainment. Likewise Ms. Booth had no expertise which would allow her to give the kind of summary testimony allowed at the hearing if offered in a court of law.

In his affidavit Mr. McLaughlin points out that land use issues require the application of specialized knowledge and training in the field. Land use information is gathered in a scientific way and evaluated according to scientific methods and principals. The "conclusions" reached by the Sheriff, GBI agent , and Ms. Booth as experts would not be allowed. The "conclusions" of the "Studies" would also not withstand scientific scrutiny. In *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) the Supreme Court ruled that in the federal courts scientific evidence *and* expert testimony must be examined by the trial judge to ensure that any and all scientific testimony

and evidence is not only relevant but admissible. This requires a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid."

Neither the testimony nor the "studies" can meet this test. Although the Supreme Court was ruling on interpretations of Federal Rule 702 of the Federal Rules of Evidence, that ruling should be instructive to state courts regarding the evidence which would be accepted as sufficient to curtail important constitutional rights.

In order to uphold the actions of the Peach County Commission we must hold that the truth does not matter, that the truth is not the truth, and that lies, in the appropriate judicial setting, must be accepted as the truth, allowing no challenge.

V. NEITHER THE SUPREME COURT OF THE UNITED STATES NOR ANY OTHER COURT HAS "HELD" AN ORDINANCE LIKE THE PEACH COUNTY ORDINANCE TO BE CONTENT NEUTRAL.

The actual number of cases in which this Court has considered restrictions on adult entertainment is surprisingly low. The cases decided by this Court which have upheld legislative restrictions on adult or sexually oriented dancing entertainment can be divided into one of three categories: a) those cases like *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) which proscribed **all public nudity** or sexual activity; b) those cases like *Young v. American Mini Theaters, Inc* and *Playtime Theatre v. City of Renton*. which curtailed adult entertainment only as to the location of the establishment, i.e. **zoning;** and 3) those cases prohibiting the sale of **alcohol** in conjunction with "adult uses."

A brief history and summary of each case follows:

***CALIFORNIA v. LARUE*, 409 U.S. 109, 93 S. Ct. 390 (1972)**

In this case, the California Department of Alcoholic Beverage Control promulgated regulations limiting **sale of alcoholic beverages** in establishments offering sexual live entertainment and films as a result of widespread actual sexual conduct on the premises of some establishments. The regulations

were challenged and found invalid in *LaRue v. State of California*, 326 F. Supp. 348 (C.D. Cal., 1971). The Supreme Court reversed, citing the Twenty First Amendment and noting that an evidentiary hearing produced evidence of frank sexual conduct on the premises involving not just the entertainers but among the customers and a finding of "gross sexuality" at the location.

***SOUTHEASTERN PROMOTIONS v. CONRAD*, 420 U.S. 546, 95 S. Ct. 1239 (1975)**

This is a case where theater promoters wished to present the musical *Hair* in a privately owned auditorium leased to the City of Chattanooga. City officials banned the musical because it includes on-stage nudity. Justice Douglas writing for the majority reversed the decision based on prior restraint principles.

***ERZNOZNIK v.CITY OF JACKSONVILLE*, 422 U.S. 205, 95 S. Ct. 2268 (1975)**

An open air, drive-in theater in Jacksonville, Fla. was showing non-obscene movies which included nudity. The City had banned such showings in " Drive-In Theaters, Films Visible From Public Streets or Public Places." The Supreme Court invalidated the ordinance as "content based."

***DORAN v. SALEM, INN, INC.*, 422 U.S. 922, 95 S. Ct. 2561 (1975)**

A Town ordinance banning topless dancing was before the Court. The Supreme Court found the ban of nudity in "any public place" to be over broad and to prohibit legitimate theatrical nudity.

***YOUNG v. AMERICAN MINI THEATRES*, 427 U.S. 50, 96 S. Ct. 2440 (1976).**

A **zoning** ordinance was used to limit the location of an adult establishment and other "undesirable establishments" to certain areas.

***SCHAD v. BOROUGH OF MOUNT EPHRAIM*, 452 U.S. 61, 101 S. Ct. 2176 (1981)**

Schad was the first of the Supreme Court decisions on the topic of Adult Uses and **zoning** decided after *Young*. Although the lower courts relied on the holding in *Young* that First Amendment protected speech could be subject to zoning (452 U.S. at 65) the myth of unique adverse secondary effects was not further developed in the case, and in fact, *Young* was found not to be controlling. (452 U.S. at 71). The Supreme Court upheld zoning designed to prohibit a "concentration of adult uses."

***BELLANCA v. NEW YORK STATE LIQUOR AUTHORITY*, 452 U.S. 714, 101 S. Ct. 2599 (1981)**

Like *California v. LaRue*, *supra*, this case deals with a ban on nude dance in establishments licensed to sell **alcoholic beverages**. The Supreme Court reversed a New York Court holding that the law violated the First Amendment citing, *LaRue* and the Twenty First Amendment. This case produced the much touted opinion (not finding of fact) "Common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior."

***PLAYTIME THEATERS v. CITY OF RENTON*, 475 U.S. 41, 106 S. Ct. 925 (1986)**

Citing *Young v. American Mini Theatres*, a majority of this Court decided that, *zoning ordinances* designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations.

***ARCARA v. CLOUD BOOKS*, 478 U.S. 697, 106 S. Ct. 3172 (1986)**

This case again relates to sexual conduct in a bookstore setting not erotic entertainment or dancing.

***CITY OF NEWPORT V. IACOBUCCI*, 479 U.S. 92, 107 S. Ct. 383 (1986)**

The City of Newport, Kentucky, immediately across the Ohio River from Cincinnati, developed a thriving adult entertainment industry as a result of Cincinnati's long history of repression of sexually oriented subject matter. Newport banned **alcohol sales** at adult locations. The Supreme Court upheld the ban citing LaRue and the Twenty First Amendment.

***FW/PBS v. CITY OF DALLAS*, 493 U.S. 215, 110 S. Ct. 596 (1990)**

A Dallas *zoning and licensing ordinance* required licenses and permits for adult uses. The Supreme Court declared the ordinance unconstitutional as a prior restraint not affording the Freedman protections.

***11126 BALTIMORE BLVD. v. PRINCE GEORGE'S COUNTY, MARYLAND*, 496 U.S. 901, 110 S. Ct. 2580 (1990)**

This case is a *per curiam* reversal of the decision of the Fourth Circuit, based on the Court's disposition of *FW/PBS*. There is no opinion *per se*.

***BARNES v. GLEN THEATRE, INC.*, 501 U.S. 560, 111 S. Ct. 2456 (1991)**

The regulation at issue in not an Adult Use Ordinance, but the Indiana Public Indecency Statute, which was enacted in 1881 banning " public nudity across the board." A concurring opinion produced Justice's Souter's quote, " I do not believe that a State is required affirmatively to undertake to litigate this issue (pernicious secondary effects of adult uses) repeatedly in every case." In fact the issue had not been litigated in any case.

CITY OF ERIE, et al. v. PAP'S A.M., tdba "KANDYLAND", UNITED STATES SUPREME COURT, case. No. 98-1161, decided March 29, 2000.

City ordinance modeled after the Indiana Public Indecency Statute. A plurality upholds the ordinance under O'Brian standards. Justice Stevens dissents arguing that the secondary effects analysis should not be applied outside of zoning

considerations. Justice Souter dissents , reversing his stand in *Barnes*, and arguing for an evidentiary showing of "secondary effects" and how the ordinance would ameliorate those effects, if any.

Unlike the enactments in *Young* and *Playtime Theatre*, the Peach County Ordinance does not simply proscribe the location of an adult establishment. Unlike *LaRue*, *Bellanca*, and *City of Newport*, the ordinance doesn't simply prohibit the sale of alcohol on adult use premises. Unlike the Indiana state law in *Barnes v. Glen Theatre*, Inc., 501 U.S. 560 (1991) or the City Ordinance in *Pap's A.M.* which were aimed at "public nudity", the Peach County Ordinance is aimed at "public nudity (either partial or total) *under certain circumstances*." Those circumstances are all situations of adult entertainment.

The Peach County Ordinance contains zoning provisions, prohibits the sale of alcohol **AND** contains provisions for licensing owners, workers, and dancers as well as detailed regulations of the presentation of the performance. On the two occasions where comprehensive licensing and regulatory schemes came before the Court, *FW/PBS* and *11126 Baltimore Blvd.* the Supreme Court of the United States struck down those ordinances. No Supreme Court of the United States decision has considered an ordinance such as the Peach County Ordinance, much less upheld one.

VI. THE ELEVENTH CIRCUIT HAS STRUGGLED OVER WHAT STANDARDS TO APPLY TO CASES SUCH AS THE PRESENT CASE.

Contrary to the argument that "the courts" have "consistently held" such ordinances to be content neutral (thus applying the *O'Brien* test), there are cases in the Eleventh Circuit which struggle to determine what test to apply to ordinances like the one passed by Peach County, such as *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). In the recent case of *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), the Eleventh Circuit found itself puzzling over which line of cases to apply and by what standards the various

aspects of the ordinance should be measured. The holding was that the various portions of an ordinance which had zoning, licensing, regulatory and disclosure provisions would be subjected to different test depending on the interest affected. Zoning and some regulations could be scrutinized by reference to *Renton* standards of "time, place, and manner", other regulations which impacted how expressive conduct could take place under O'BRIEN rules, and **licensing, disclosure and other provisions which had the effect of "chilling" the exercise would be subjected to "exacting [strict] scrutiny."** This approach is a substantial step toward the level of "searching scrutiny" urged by Judge Kravitch in *Sammy's of Mobile, Ltd.*, 140 F.3d 993 (11th Cir. 1998). This Court should formulate a standard to be applied to an entire enactment or standards to be applied to each of the protected interests at risk.

CONCLUSION

Because the opinion of the Supreme Court dated January 18, 2000, cases decided by the Eleventh Circuit Court of Appeals and the recent case of this Court in *Paps A.M. tdba "Kandyland"* do not clearly announce a standard for reviewing challenges to a legislative enactment designed to curtail or regulate adult entertainment,

This Court should grant certiorari to establish a clearly defined standard (or standards) for the review of any legislative enactment which regulates adult entertainment or adult entertainers.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA DATED AND DECIDED JANUARY 18, 2000

In the Supreme Court of Georgia

Decided: JAN 18 2000

S99A1256. CAFÉ EROTICA, INC. v. PEACH COUNTY

BENHAM, Chief Justice.

At issue in this appeal is the constitutionality of an ordinance passed by Peach County regulating the sale and consumption of alcohol at adult entertainment establishments. Appellant Café Erotica is a business in Peach County that serves alcohol and offers nude dancing for the entertainment of its patrons. This Court ruled in *Chambers v. Peach County*, 266 Ga. 318 (467 SE2d 519) (1996) ("*Chambers I*"), that the ordinance was unconstitutional because the County, in enacting the ordinance, failed to rely on evidence reasonably related to the harmful secondary effects of adult entertainment establishments the County wished to regulate and thus violated the First Amendment free speech rights of the establishments.

In response to *Chambers I*, the Board of Commissioners of Peach County conducted a public hearing regarding the potential negative impact of adult entertainment establishments. The stated purpose of the public hearing was to evaluate the impact of adult entertainment establishments on the interests of the citizens of Peach County in order to determine the necessity of regulating adult entertainment establishments. At the hearing, the Commissioners reviewed

studies conducted by other jurisdictions and also heard testimony from local law enforcement officials regarding increased criminal activity near adult entertainment establishments in Peach County. The Commissioners concluded that the sale of alcohol at adult entertainment establishments "has or may have serious adverse effects on the surrounding community, including an increase in certain types of criminal activity and a decrease in property values." An Ordinance to Prohibit Specified Types of Entertainment, Attire, and Conduct Upon Any Premises Licensed to Sell, Serve, or Dispense Alcoholic Beverages Within the Unincorporated Area of Peach County; To Regulate Specified Types of Employment, Live Entertainment, and Contests; and for Other Purposes, enacted September 10, 1996.

Based on the Commissioners' findings, Peach County passed a new ordinance prohibiting the sale and consumption of alcohol at adult entertainment establishments. Shortly thereafter, Veeda Chambers, the plaintiff in *Chambers I*, brought an action to enjoin the enforcement of the new ordinance and requested an interlocutory injunction. The trial court denied Chambers' motion for interlocutory injunction. This Court upheld the constitutionality of the ordinance with respect to the alcohol restriction when it affirmed the trial court's denial of an interlocutory injunction in *Chambers v. Peach County*, 268 Ga. 672 (492 SE2d 191) (1997) ("Chambers II").

While *Chambers II* was pending, Café Erotica brought this suit seeking to enjoin the enforcement of the Peach County ordinance. Both parties filed motions for summary

judgment. The trial court granted Peach County's motion for summary judgment and denied Café Erotica's motion for summary judgment, resulting in this appeal.

We hold that the trial court did not err in upholding the constitutionality of the ordinance. The trial court properly followed our holding in *Chambers II* where we found that the ordinance in question was content-neutral and analyzed the constitutionality of the ordinance in question using the three-pronged test outlined in *Paramount Pictures v. Busbee*, 250 Ga. 252 (1) (297 SE2d 250) (1982). Café Erotica presents no new evidence or arguments that would give us cause to depart from our holding in *Chambers II*.

1. Café Erotica contends that the ordinance is not content-neutral, as evidenced by a statement made by the County Attorney that the County was attempting to eliminate nude dancing. Café Erotica urges that we disregard the stated intent of the Peach County Board of Commissioners in passing the legislation and focus on the statement made by the County Attorney in determining the true intent behind the legislation. However, caution should be used when inquiring into legislative intent. *U.S. v. O'Brien*, 391 U.S. 367, 383-384 (88 SC 1673, 20 LE2d 672) (1968); *State v. Miller*, 260 Ga. 669 (398 SE2d 547) (1990). In overturning a facially constitutional statute based on extrinsic evidence of the legislature's intent, only the "clearest proof" will suffice as justification. *Fleming v. Nestor*, 363 U.S. 603, 617 (80 SC 1367, 4 LE2d 1435) (1960). In *Goldrush II v. City of Marietta*, 267 Ga. 683 (482 SE2d 347) (1997), we refused to invalidate a similar ordinance regulating adult entertainment where there was evidence that the mayor and

several council members expressed their intent to abolish nude dancing from the City of Marietta. Based on these holdings, we conclude that the statement of the County Attorney, who was not on the Board of Commissioners and was not entitled to vote for enactment of the ordinance, is not sufficient evidence to cause us to depart from our ruling in *Chambers II* that the ordinance is content-neutral.

Café Erotica calls our attention to language in the ordinance that specifically references "nude entertainment," "adult entertainment," "live commercial nudity in general," and "cinematographic entertainment," adult entertainment," "live commercial nudity in general," and "cinematographic or videographic adult entertainment" in support of its argument that the ordinance is not content neutral. This language was present at the time we determined the ordinance to be content-neutral in *Chambers II* and we see no need to depart from this conclusion.

2. In its second enumeration of error, Café Erotica contends the trial court erred in applying intermediate scrutiny. Since we find that the ordinance was content-neutral, the trial court did not err in applying the intermediate scrutiny standard for content-neutral legislation outlined in *Paramount Pictures*, supra; See *Goldrush II v. City of Marietta*, 267 Ga. 683 (5) (482 SE2d 347) (1997).

3. Café Erotica challenges the adequacy of the evidence relied upon by Peach County in its determination that an important governmental interest was threatened by adult entertainment establishments. In its third enumeration of error, Café Erotica contends that the trial court erred in

holding that an important governmental interest was threatened because there was no evidence that Peach County had experienced any of the negative effects it believed to be associated with adult entertainment establishments. In another enumeration, Café Erotica argues that the trial court erred in simply inquiring whether the Commissioners "reasonably believed" that the evidence they used supported their position and not examining the information the Board of Commissioners used in deciding to implement the ordinance. Café Erotica asserts that Peach County was required to present probative evidence to support its findings and asserts that the trial court should have examined the suitability of the evidence relied upon.

In making these arguments, Café Erotica urges this Court to impose more stringent duties upon the Peach County Board of Commissioners than is required by the case law. Café Erotica cites *Discotheque, Inc. v. City Council of Augusta*, 264 Ga. 623 (449 SE2d 608) (1994), in support of its contention that Peach County was required to produce probative evidence that negative secondary effects resulted from the sale of alcohol at adult entertainment establishments. However, in *Discotheque*, we only required probative evidence that the legislative body relied upon studies relating to the negative secondary effects it attempted to combat in enacting an ordinance regulating speech. *Discotheque*, supra at 609-610; *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 530 (457 SE2d 816) (1995). A local government may rely upon the studies conducted by other jurisdictions as long as the evidence it relies upon is reasonably believed to be related to the problem the city is attempting to address. *City of Renton v. Playtime Theatres*,

475 US 41, 51-52 (106 SC 925, 89 LE2d 29) (1986); *Club Southern Burlesque v. City of Carrollton*, supra. Nor is a legislative body required to conduct *ad hoc* studies relating to the negative secondary effects of the speech it wishes to regulate or show that the negative secondary effects it is attempting to prevent have actually been experienced. *City of Renton*, supra; *Club Southern Burlesque*, supra; *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157, 1162-1163 (11th Cir. 1991). Thus, the trial court did not err in finding that an important governmental interest was threatened in Peach County based on the hearing the Board of Commissioners conducted for that purpose and also did not err in employing a "reasonable belief" standard in scrutinizing the studies Peach County relied upon in enacting the ordinance.

4. For the reasons stated above, we find that the trial court did not err when it denied Café Erotica's motion for summary judgment and granted Peach County's motion for summary judgment.

Judgment affirmed. All the Justices concur.

APPENDIX B — ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT DATED JANUARY 14, 1999

IN THE SUPERIOR COURT OF PEACH COUNTY
STATE OF GEORGIA

Civil Action No. 96-V-556

CAFÉ EROTICA, INC., d/b/a "CAFÉ EROTICA,"

Plaintiff,

vs.

PEACH COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS OF PEACH COUNTY, GEORGIA, CHARLES BARTLETT, Individually and in his capacity as Chairman of the Board of Commissioners of Peach County, Georgia, MATT MULLIS, DR. IRA HICKS, JIMMY WALKER, AND ANNA LUMPKIN, Individually and in their capacity as members of the Board of Commissioners of Peach County, Georgia,

Defendants.

ORDER ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Defendants filed a Motion for Summary Judgment, plaintiff filed a response and also filed a Motion for Summary Judgment. Having considered the record, briefs and argument of counsel, the court GRANTS Defendant's motion and DENIES plaintiff's motion.

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This court must follow the two most recent Georgia Supreme Court decisions addressing the issues raised in this case; *Quetgles v. City of Columbus*, 268 Ga. 619 (1997) and *Chambers v. Peach County*, 268 Ga. 672 (1997).

As for the defendant's Motion for Summary Judgment, the defendant must show that no genuine issue of material fact remains as to its satisfaction of the requirements of the three-part test set forth in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (1982). The court finds that Defendant has met this burden.

The Supreme Court of Georgia has stated that "the [county] need only prove it considered specific evidence of the negative secondary effects of adult entertainment businesses which it reasonably believed to be relevant to the interests motivating the ordinance." 268 Ga. at 620. The Court has also stated that the "First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528 at 818 [quoting *Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986)).

This court finds that Peach County did more that just rely upon written studies obtained from other jurisdictions. The preamble to the Ordinance in question sets forth what was considered by the County; it states, in part:

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Based on Peach County, Georgia's own experiences with establishments offering public nudity in conjunction with the sale of alcoholic beverages and the experiences of other counties and municipalities, including, but not limited to, Austin, Texas and Garden Grove, California, which experiences are found to be relevant to the problems faced by Peach County, Georgia; and based on the documentary evidence and oral testimony presented by citizens, law enforcement professionals and an expert in economic development, many of whom are familiar with conditions resulting in Peach County, Georgia and in other localities, at the public hearing on May 7, 1996; and based on the evidence and testimony of persons who have appeared before members of the Peach County Board of Commissioners on other occasions and on documentary evidence submitted to the Board of Commissioners, the Peach County Board of Commissioners takes note of the well-known and self-evident conditions and secondary effects attendant to the commercial exploitation of human sexuality."

Moreover, at the public hearing, the county heard testimony from various witnesses. The commissioners heard from a developmental specialist with the Middle Georgia Development Authority; the Sheriff of Peach County; an agent with the Georgia Bureau of Investigation out of the Macon regional drug office; and others.

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Further, this case has already been on appeal to the Georgia Supreme Court on the issue of whether this court erred when it denied Plaintiff's request for an interlocutory injunction. This court had denied plaintiff's motion, concluding that the new ordinance was constitutional and that the plaintiff had not shown a likelihood of success on the merits. The Supreme Court in *Chambers v. Peach County*, 268 Ga. 672 (1997), affirmed the decision of the trial court. The Court ruled that the ordinance in question here "is designed to combat the undesirable secondary effects of sexually explicit businesses, it is content-neutral." and "The ordinance in question meets the *Paramount* criteria in that it furthers important governmental interests (the reduction) of crime and the protection of property values) which interests are unrelated to the suppression of speech, and the incidental restriction of speech is no greater that necessary to further the governmental interest." 268 Ga. at 674.

The position advocated by the plaintiff in this case is not supported by the law of the State of Georgia or by the decisions of the United States Supreme Court.

Therefore, defendant's Motion for Summary Judgment is hereby GRANTED and plaintiff's Motion for Summary Judgment is hereby Denied

So ordered this 14 day of January, 1999.

s/ Martha C. Christian
Martha C. Christian
Judge, Superior Court
Macon Judicial Circuit

APPENDIX C — ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED FEBRUARY 11, 2000

SUPREME COURT OF GEORGIA

Case No. S99A1256

Atlanta, February 11, 2000

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CAFE EROTICA, INC.,
d/b/a CAFÉ EROTICA v. PEACH COUNTY

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

APPENDIX D — ORDINANCE REGULATING ADULT ENTERTAINMENT ESTABLISHMENTS PASSED JUNE 11, 1996

ORDINANCE REGULATING ADULT ENTERTAINMENT ESTABLISHMENTS

PASSED 6/11/96

INTRODUCTION

Section I. *Findings: Public Purpose*

Based on Peach County, Georgia's own experiences with establishments offering public nudity in conjunction with the sale of alcoholic beverages and the experiences of other counties and municipalities, including, but not limited to, Austin, Texas and Garden Grove, California, which experiences are found to be relevant to the problems faced by Peach County, Georgia; and based on the documentary evidence and oral testimony presented by citizens, law enforcement professionals and an expert in economic development, many of whom are familiar with conditions resulting in Peach County, Georgia and in other localities, at the public hearing on May 7, 1996; and based on the evidence and testimony of persons who have appeared before members of the Peach County Board of Commissioners on other occasions and on documentary evidence submitted to the Board of Commissioners, the Peach County Board of Commissioners takes note of the well-known and self-evident conditions and secondary effects attendant to the commercial exploitation of human sexuality, which do not vary greatly among the various communities within our country.

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It is the finding of the Board of Commissioners of Peach County that public nudity (either partial or total) under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in establishments offering live nude entertainment or "adult entertainment," (whether such alcoholic beverages are sold on the premises or not) begets criminal behavior and tends to create undesirable community conditions. In the same manner, establishments offering cinematographic or videographic adult entertainment have the same deleterious effects on the community.

Among the acts of criminal behavior found to be associated with the commercial combination of live nudity and alcohol, live commercial nudity in general, and cinematographic or videographic adult entertainment are disorderly conduct, prostitution, public solicitation, public indecency, drug use and drug trafficking. Among the undesirable community conditions identified in other communities with the commercial combination of live nudity and alcohol, commercial nudity in general, and cinematographic or videographic adult entertainment are depression of property values and acceleration of community blight in the surrounding neighborhood, increased allocation of and expenditure for law enforcement personnel to preserve law and order, and increased burden on the judicial system as a consequence of the criminal behavior hereinabove described. The Board of Commissioners finds it is reasonable to believe that some or all of these undesirable community conditions will result in Peach County, as well.

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Furthermore, it is the finding of the Peach County Board of Commissioners that other forms of adult entertainment including, but not limited to, adult book stores, peep shows, adult theaters and massage parlors have an adverse effect upon the quality of life in surrounding communities.

The Board of Commissioners of Peach County, Georgia, therefore finds that it is in the best interests of the health, welfare, safety and morals of the community and the preservation of its businesses, neighborhoods, and of churches, schools, residential areas, public parks and playgrounds to prevent or reduce the adverse impacts of adult entertainment establishments. Therefore, the Board of Commissioners of Peach County finds that licensing and regulations are necessary for any adult entertainment establishment. The Board finds that these regulations promote the public welfare by furthering legitimate public and governmental interests, including but not limited to, reducing criminal activity and protecting against or eliminating undesirable community conditions and further finds that such will not infringe upon the protected Constitutional rights of freedom of speech or expression. To that end, this Ordinance is hereby adopted.

Section II. *Definitions*

(A) "Adult entertainer" means any person employed by an adult entertainment establishment who exposes his or her "specified anatomical areas," as defined herein. For purposes of this section, adult entertainers include employees as well as independent contractors.

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(B) "Adult entertainment" means entertainment that is characterized by an emphasis on the depiction, display or the featuring of "specified anatomical areas."

(C) "Adult entertainment establishment" shall be defined to include the following types of business:

1. Any commercial establishment that employs or uses any person live, in any capacity in the sale or service of beverages or food while such person is unclothed or in such attire, costume or clothing, so as to expose any portion of his or her "specified anatomical areas," as defined herein;

2. Any commercial establishment which provides live entertainment where any person appears unclothed or in such attire, costume or clothing as to expose any portion of his or her "specified anatomical areas" as defined herein or where such performances are distinguished or characterized by an emphasis on "specified sexual activities," as defined herein;

3. Any commercial establishment which holds, promotes, sponsors or allows any contest, promotion, special night, event or any other activity where live patrons of the establishment are encouraged or allowed to engage in any of the conduct described in subsections II(C)(1) and (2) herein;

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4. Any commercial establishment having a substantial or significant portion of its stock in trade, books, magazines or other periodicals, videotapes or movies or other reproductions, whether for sale or rent, which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" as defined herein or "specified anatomical areas" as defined herein or having a segment or section comprising 5% of its total floor space, devoted to the sale or display of such material or which derives more than 5% of its net sales from the sale or rental of such material;

5. Any commercial establishment utilizing an enclosed building with a capacity of fifty (50) or more persons used for cinematographic or videographic presentation of material distinguished by or characterized by an emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas", as defined herein, for observation by patrons therein;

6. The definition of "adult entertainment establishment" shall not include traditional or live theater (mainstream theater) which means a theater, concert hall, museum, educational institution or similar establishment which regularly features live performances which are not distinguished or characterized by an emphasis on the depiction, display, or description or the featuring of "specified

anatomical areas" or "specified sexual activities" in that the depiction, display, description or featuring is incidental to the primary purpose of any performance;

(D) "Minor" shall be defined as a person who has not attained the age of 18 years;

(E) "Operator" means the manager or other person principally in charge of an adult entertainment establishment;

(F) "Owner" means any individual or entity holding more than a 20% interest in an adult entertainment establishment;

(G) "Premises" means the defined, closed or partitioned establishment, whether room, shop or building wherein adult entertainment is performed;

(H) "Specified sexual activities" shall be defined to mean and include any of the following:

1. Actual or simulated sexual intercourse, oral copulation, anal intercourse, oral anal copulation, bestiality, direct physical stimulation of unclothed genitals, flagellation or torture in the context of a sexual relationship, or the use of excretory functions in the context of a sexual relationship and any of the following sexually oriented acts or conduct: analingus, buggery, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerisn, sapphism, zooeragty; or

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2. Use of human or animal ejaculation, sodomy, oral copulation, coitus or masturbation; or

3. Fondling or other erotic touching of nude human genitals, pubic region, buttocks or female breast; or;

4. Masochism, erotic or sexually oriented torture, beating or the infliction of pain; or

5. Erotic or lewd touching, fondling or other sexual contact with an animal by a human being;

(I) "Specified anatomical areas" shall include the following:

1. Less than completely and opaquely covered human genitals or pubic region, cleft of the buttocks, or female breast below a point immediately above the top of the areola; or

2. Human male genitalia in a discernibly turgid state, even if completely and opaquely covered.

Section III. *License Required*

It shall be unlawful for any person, association, partnership or corporation to operate, engage in, conduct, or carry on, in or upon, any premises within the unincorporated area of Peach County an adult entertainment establishment as defined in this ordinance without a license to do so. The issuance of such license shall not be deemed to authorize,

condone or make legal any activity thereunder if the same is deemed illegal or unlawful under the laws of the State of Georgia or the United States. No license for an adult entertainment establishment shall be issued by the County if the premises to be used also holds a license to sell alcoholic beverages or malt beverages and wine for consumption on the premises. Any premises licensed as an adult entertainment establishment shall not be eligible to apply at any time for a license to sell alcoholic beverages or malt beverages and wine for consumption on the premises. The annual license fee for an adult entertainment establishment shall be $1,000.00.

Section IV. *On-premises operator required*

An adult entertainment establishment shall have a designated person(s) to serve as an on-premises operator. The operator(s) shall be principally in charge of the establishment and shall be located on the premises during all operating hours.

Section V. *Application Process and Qualifications*

(A) *Process.* Any person, association, partnership or corporation desiring to obtain a license to operate, engage in, conduct, or carry on any adult entertainment establishment in the unincorporated areas of Peach County shall make application to the County Administrator of Peach County. Such application shall be made on forms furnished by Peach County, shall be made in the name of the adult entertainment establishment by an applicant who is a natural person and an agent of the adult entertainment establishment and shall

include the name(s) of the operator(s) as defined herein and of the owner(s) as defined herein. If the adult entertainment establishment is a corporation, then the agent for purposes of making application for a license hereunder shall be an officer of the corporation. If the adult entertainment establishment is a partnership, the agent for such purposes shall be a general partner.

At the time of submitting such application, a nonrefundable fee payable in cash or by certified check in the amount of $45.00 shall be paid to the County Administrator to defray, in part, the cost of investigation and report required by this ordinance. The County Administrator shall issue a receipt showing that such application fee has been paid.

The application for license does not authorize the operation of, engaging in, conduct or carrying on of any adult entertainment establishment.

(B) *Contents*. Each application for an adult entertainment establishment license shall contain the following information:

1. The full true name and any other names used by the applicant, the operator(s) and owner(s);

2. The present address and telephone number of the applicant, the operator(s) and owner(s);

3. The previous addresses of the applicant, the operator(s) and the owner(s), if any, for a period five (5) years immediately prior to the date of the application and the dates of residence at each;

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4. Acceptable written proof that the applicant, the operator(s) and the owner(s) are at least eighteen (18) years of age;

5. The operator(s)' height, weight, color of eyes and hair and date and place of birth;

6. Two (2) photographs of the operator(s) at least two (2) inches by two (2) inches taken within the last six months;

7. The business, occupation or employment history of the applicant, the operator(s) and owner(s) for the five (5) years immediately preceding the date of application;

8. The business license history of the adult entertainment establishment seeking a license and whether such establishment, in previous operations in this or any other location under license, has had such license or permit for an adult entertainment business or similar type of business revoked or suspended, the reason therefor, and the business activity or occupation subsequent to such action of revocation or suspension;

9. If the application is made on behalf of a corporation, the name of the corporation, exactly as shown in its articles of incorporation or charter, together with the place and date of incorporation, and the names and addresses of each of its current officers and directors, and each stockholder holding

more than twenty (20%) percent of the stock in the corporation. If the application is on behalf of a limited partnership, a copy of the certificate of limited partnership filed with the County Clerk shall be provided. If one or more of the partners is a corporation, the provisions of this subsection pertaining to corporations shall apply;

10. The names and addresses of the owner and lessor of the real property upon which the adult entertainment establishment is to be operated, engaged in, conducted or carried on and a copy of the lease or rental agreement;

11. Such other identification and information as the Sheriff's Department may require in order to discover the truth of the matters hereinbefore specified as required to be set forth in the application;

12. With respect to the applicant, the operator(s) and the owner(s), all convictions, (excluding misdemeanor traffic violations unrelated to driving under the influence of drugs or alcohol) within the past five (5) years, including a complete description of the crime or violation, the date of the crime or violation, date of conviction (including plea of guilty or nolo contendere), jurisdiction and any disposition, including any fine or sentence imposed and whether terms of disposition have been fully completed. Each person required to disclose convictions hereunder shall also provide a signed

and notarized consent, on forms prescribed by the Georgia Crime Information Center, authorizing the release of his or her criminal records to the Peach County Sheriff's Department.

13. A complete set of fingerprints of the applicant and the operator(s);

14. If the person or business entity on whose behalf application for a license is doing business under a trade name, a copy of the trade name as properly recorded. If the application is made on behalf of a corporation, a copy of its authority to do business in Georgia, including articles of incorporation, trade name affidavit, it any, and last annual report, if any;

15. At least three (3) character references for the applicant, the operator(s) and owner(s) from individuals who are in no way related to the applicant or any operator(s) or owner(s) and who do not or will not benefit financially in any way from the application if the license is granted and who have not been convicted of any felony or a crime or Peach County Ordinance involving moral turpitude in the past five (5) years. Peach County shall prepare forms consistent with the provisions of this subsection for the applicant, the operator(s) and owner(s), who shall submit all character references on such forms;

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16. The address of the premises where the adult entertainment establishment will be operated, engaged in, conducted, or carried on;

17. A plat by a registered engineer or a registered land surveyor, licensed by the State of Georgia, showing the location of the proposed promises where the adult entertainment establishment will be operated, engaged in, conducted or carried on in relation to the neighborhood, the surrounding zoning, its proximity to any residential area, church, school, public park or playground, establishment selling alcoholic beverages or malt beverages and wine or other adult entertainment establishment;

18. Each application for an adult entertainment establishment license shall be verified and acknowledged under oath to be true and correct by:

    (a) If application is made on behalf of an individual, the individual;

    (b) If application is made on behalf of a partnership, by a general partner;

    (c) If application is made on behalf of a corporation, by the president of the corporation;

    (d) If application is made on behalf of any other organization or association, by the chief administrative official.

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(C) *Appearance by Applicant.* The applicant shall personally appear before the County Administrator and produce proof that a nonrefundable application fee, in an amount established by resolution of the Board of Commissioners, has been paid and shall present the application containing the aforementioned and described information.

(D) *Investigation; Standards for Granting of License.* The County shall have thirty (30) days to investigate the facts provided in the application and the background of the applicant, the operator(s) and owner(s). Upon completion of the investigation, the County Administrator shall grant the license if he/she finds:

1. The required fee has been paid;

2. The application conforms in all respects to the provisions of this ordinance;

3. The applicant has not knowingly made a material misrepresentation in the application;

4. The applicant has fully cooperated in the investigation of the application;

5. Neither the applicant nor any of the operator(s) or owner(s) has been convicted in a court of competent jurisdiction of a felony or a crime not a felony involving moral turpitude in the last five (5) years;

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6. Neither the applicant nor any of the operator(s) or owner(s) has had an adult entertainment establishment license or other similar license or permit denied or revoked for cause by this County or any other county or municipality located in or out of this State prior to the date of application within the preceding five (5) years;

7. The building, structure, equipment and location of the premises of the adult entertainment establishment as proposed by the applicant would comply with all applicable laws, including but not limited to health, zoning, distance, fire and safety requirements and standards;

8. The applicant is at least eighteen (18) years of age;

9. On the date the business for which a license is required herein commences, and thereafter, there will be an operator(s) as defined herein on the premises at all times during which the business is open;

10. The proposed premises is not to be located too close to any residential area, church, school, public park or playground, or establishment licensed to sell alcoholic beverages or malt beverages and wine, or another adult entertainment establishment; and

11. The grant of such license will not cause a violation of and will not be in conflict with this ordinance or any other law, ordinance or regulation, of Peach County, the State of Georgia or the United States.

If, after thirty (30) days, the application is complete and in all respects conforms to the provisions of this ordinance but the background investigation contemplated by this section is incomplete, the license shall be granted, subject to the right of the Board of Commissioners to revoke the license if the investigation reveals a criminal conviction or license denial or revocation that makes the applicant ineligible for a license.

Section VI. *Regulation of Adult Entertainment Establishments*

(A) *Location.* No adult entertainment establishment shall be located:

1. Within one thousand (1,000) feet of any parcel of land which is either named or used for residential uses or purposes ("a residential area");

2. Within one thousand (1,000) feet of any parcel of land or which a church, school, public park or playground is located;

3. Within one thousand (1,000) feet of any parcel of land upon which another adult entertainment establishment regulated or defined hereunder is located;

4. Within one thousand (1,000) feet of any parcel of land upon which any establishment selling alcoholic beverages or malt beverages and wine is located;

5. On less than three (3) acres of land containing at least one hundred (100) feet of road frontage.

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For purposes of this section, distance shall be by airline measurement from property line, using the closest property lines of the parcels of land involved. The term "parcel of land" means any quantity of land capable of being described by location and boundary, designated and used or to be used as a unit.

(B) *Adult entertainment establishment employees.*

1. *Qualifications.*

Employees of an adult entertainment establishment shall be not less than eighteen (18) years of age. No employee employed as an adult entertainer shall have been convicted of a sex-related crime or drug-related or alcohol-related felony within the five years immediately preceding the proposed employment at or by an adult entertainment establishment. Any adult entertainer who is convicted of any such crimes while employed as an adult entertainer shall not thereafter work on any licensed premises for a period of five (5) years from the date of such conviction, unless a longer time is ordered by a court of competent jurisdiction. The term "licensed premises" shall mean the premises where an adult entertainment establishment for which a license is obtained pursuant to this ordinance operates, conducts or carries on its business. The term "convicted" shall include an adjudication of guilt or a plea of guilty or nolo contendere or the forfeiture of a bond when charged with a crime.

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2. *Permit for employment.*

Before any person may work as an adult entertainer on a licensed premises, as defined in Section VI(B)(1), he or she shall file a notice with the County Administrator of Peach County of his or her intended employment on forms supplied by the County Administrator and shall receive a permit for such employment from the County Administrator. The prospective employee shall supply a signed and notarized consent, on forms prescribed by the Georgia Crime Information Center, authorizing the release of his or her criminal records to the Peach County Sheriff's Department. The prospective employee shall also provide a list of all of his or her convictions of sex-related crimes and drug-related or alcohol-related felonies (including pleas of guilty or nolo contendere) within the past five (5) years. The County shall have fifteen (15) days to investigate the prospective employee. If the prospective employee is found to meet the requirements of this section VI (B), then upon certification by the Sheriff of Peach County that such requirements have been met, and upon payment of the permit fee, the County Administrator shall issue a permit approving such employment. Upon receipt of a permit, the employee may begin working on the licensed premises. If approval is denied, the County Administrator shall provide him or her the reasons for the denial and the prospective employee may,

within ten (10) days of said denial, apply to the Board of Commissioners, which may uphold or reverse the decision. The annual permit fee shall be $45.00.

3. *Suspension or revocation of permit; Procedure.*

Violation by an adult entertainer of the provisions of this ordinance and/or conviction of a sex-related crime or drug-related or alcohol-related felony shall subject an adult entertainer to suspension or revocation of the permit for employment. Whenever the Board of Commissioners finds that reasonable grounds exist to suspend or revoke a permit for employment issued hereunder, the Board shall schedule a hearing to consider such action and shall notify the employee at least 20 days prior to the hearing of the time and place of the hearing and the proposed action and grounds therefor. The employee shall be entitled to present evidence and cross-examine witnesses with or without legal counsel. The Board shall make its decision within ten (10) days of the hearing and shall notify the employee promptly in writing.

4. *Independent contractors.*

For the purpose of this ordinance, independent contractors working as adult entertainers shall be considered as employees and shall be required to satisfy the provisions of this

ordinance relating to employees of adult entertainment establishments, regardless of the business relationship with the owner or licensee of any adult entertainment establishment.

(C) *Hours of operation.* An adult entertainment establishment may be open only between the hours of 8:00 a.m. and 2:00 a.m.

(D) *Display of license.* An adult entertainment establishment licensee shall conspicuously display the license required by this ordinance.

(E) *Performance area.* All dancing by adult entertainers at adult entertainment establishments shall occur on a platform intended for that purpose which is raised at least eighteen (18) inches from the level of the floor.

(F) *Lighting.* All areas of an adult entertainment establishment licensed hereunder shall be fully lighted at all times patrons are present. Full lighting shall mean illumination equal to three and five tenths (3.5) foot candles per square foot.

(G) *Protected viewing.* All adult entertainment which is licensed and permitted by this ordinance shall be carried on inside a closed building with all windows and doors covered so that the activities carried on inside cannot be viewed from the immediate areas surrounding the outside of the building.

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Section VII. *Conduct or activities prohibited*

(A) *Advertising without license.* No person, partnership, corporation or other entity shall advertise or cause to be advertised an adult entertainment establishment without a valid adult entertainment establishment license issued pursuant to this ordinance.

(B) *Employment of minors or unpermitted persons.* No adult entertainment establishment licensee shall employ or contract with a person under the age of eighteen (18) years or an adult entertainer who has not obtained a permit pursuant to this ordinance.

(C) *Sale, consumption of alcohol.* No adult entertainment establishment licensee shall serve, sell, distribute or suffer the consumption or possession of any alcoholic beverages, malt beverages or wine or controlled substance upon the premises of the licensee.

(D) *Contact between patrons, employees.* No dancing or other performance by an adult entertainer at an adult entertainment establishment shall occur closer than four (4) feet to any patron. No patron, customer or guest shall be permitted to touch, caress or fondle any specified anatomical area of or any part of the body or clothing of any adult entertainer. No patron shall directly pay or give any gratuity to any adult entertainer. No adult entertainer shall solicit any pay or gratuity from any patron.

(E) *Engaging in specified sexual activities prohibited.* No adult entertainer, other employee, patron or other person at an adult entertainment establishment shall be allowed to engage in any specified sexual activity as defined herein on the premises of any adult entertainment establishment.

(F) *Public indecency prohibited.* No adult entertainer, other employee, patron or other person at an adult entertainment establishment shall, while on the premises of an adult entertainment establishment, commit the offense of public indecency as defined in O.C.G.A. section 16-6-8.

Section VIII. *Penalty for Violation*

Any person violating any of the provisions of Section VII of this ordinance shall be guilty of a misdemeanor, punishable by a fine not to exceed one thousand dollars ($1,000.00) per violation or by imprisonment for a period not to exceed six (6) months, or both.

Section IX. *Unlawful Operation Declared Nuisance*

Any adult entertainment establishment operated, conducted or maintained contrary to the provisions of this ordinance shall be and the same is hereby declared to be unlawful and a public nuisance. The County may, in addition to or in lieu of prosecuting a criminal action hereunder, commence an action or actions, proceeding or proceedings for abatement, removal or enjoinment thereof in the manner provided by law. It shall take such other steps and shall apply to such court or courts as may have jurisdiction to grant such relief as will abate or remove such adult entertainment

establishment and restrain and enjoin any person from operating, engaging in, conducting or carrying on an adult entertainment establishment contrary to the provision of this ordinance.

Section X. *Conditions of Adult Entertainment Establishment*

(A) *Cleaning of Licensed Premises.* All adult entertainment establishments shall be kept in a clean, sanitary condition, and shall be in full compliance with all applicable ordinances and regulations of the County and the State.

(B) *Inspection of Licensed Premises.* The Peach County Marshal shall have the authority to regularly inspect adult entertainment establishments to determine compliance with and enforce all applicable fire, health and other codes of the County.

(C) *Sealing for Unsanitary or Unsafe Conditions.* The Peach County's Sheriff's Department shall have the authority to periodically inspect adult entertainment establishments to determine compliance with and enforce all provisions of this ordinance and other applicable ordinances, regulations and laws.

Section XI. *Denial, Suspension or Revocation; Hearing.*

(A) *Grounds.*

1. A license may be denied to persons or entities that have failed to satisfy any of the requirements of Section V(D) above.

Appendix D

2. Any of the following shall be grounds for suspension or revocation, as the Board of Commissioners sees fit, of a license:

(a) The making of any statement on an application for a license issued hereunder which is material and is later found to be false;

(b) Violation of any of the regulations or prohibitions of this ordinance;

(c) With respect to the applicant, operator(s) and owner(s), conviction of or a plea of guilty or nolo contendere to any of the crimes which would make such person or adult entertainment establishment ineligible to hold a license under Section V(D) above.

(B) *Denial; Procedure.* The Board of Commissioners shall provide an applicant whose license application is denied with written notice of the decision to deny and reason(s) therefor within 10 days of the decision. Notice shall be delivered in person or by certified mail. The applicant shall have 15 days following the receipt of such notice to request a hearing before the Board of Commissioners, which hearing shall be held within 30 days of such request. The applicant shall be entitled to present evidence and examine witnesses at such hearing either with or without legal counsel. The Board shall make its decision within ten (10) days of the hearing and shall promptly notify the applicant in writing.

(C) *Suspension or Revocation; Procedure.* Whenever the Board finds reasonable grounds exist to suspend or revoke a license issued hereunder, the Board shall schedule a hearing to consider such suspension or revocation and shall, at least 20 days prior to the hearing, notify the licensee of the time and date of the hearing and the proposed action and the grounds therefor. The licensee shall be entitled to present evidence and cross-examine any witnesses at the hearing, with or without legal counsel. The Board shall make its decision within ten (10) days of the hearing and shall promptly notify the licensee in writing.

Section XII. *Miscellaneous*

Nothing contained in this ordinance shall be deemed to permit or condone any activity whatsoever which is otherwise found to be obscene, lewd or illegal under any applicable code, regulation or statute which provides any prohibition upon nudity or sexual activity. Further, the activities and uses which are regulated and permitted by this ordinance shall only be allowed if they are not obscene or lewd and not in violation of any other such prohibitions on nudity or sexual activity. This section shall supersede and limit all other provisions of this ordinance.

Section XIII. ***Severability***

If any portion or subsection of this ordinance or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the remainder or application to other persons or circumstances shall not be affected.

Appendix D

So adopted this 11th day of June, 1996.

PEACH COUNTY, GEORGIA

By: s/ Charles Bartlett
Charles Bartlett, Chairman

ATTEST:

s/ Marcia D. Willis
Marcia D. Willis
Peach County Administrator

(2)

99-1811

~~No. 99-1256~~

Supreme Court, U.S.
FILED
JUL 11 2000
CLERK

IN THE

Supreme Court of the United States

CAFÉ EROTICA, INC.,

Petitioner,

v.

PEACH COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS OF PEACH COUNTY, GEORGIA, CHARLES BARTLETT, Individually and in his capacity as Chairman of the Board of Commissioners of Peach County, Georgia, MATT MULLIS, DR. IRA HICKS, JIMMY WALKER, and ANNA LUMPKIN, Individually and in their capacity as members of the Board of Commissioners of Peach County, Georgia,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Georgia Supreme Court properly upheld the Peach County, Georgia, Ordinance Regulating Adult Entertainment Establishments pursuant to the clearly defined standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

2. Whether the Georgia Supreme Court properly held that Peach County had a reasonable basis for its belief that the harm to be protected against in fact exists.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under the First and Fourth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and the Ordinance Regulating Adult Entertainment Establishments of Peach County which is set forth in Appendix D of the Petition.

STATEMENT OF THE CASE

Café Erotica, Inc., petitioner herein, (hereinafter "Petitioner" or "Café Erotica") is a business in Peach County, Georgia that offers totally and partially nude dancing and has sold beer to its patrons. Peach County and the Peach County Board of Commissioners, Respondents herein, (hereinafter "Respondent" or "Peach County"), conducted a public hearing, (R-189-241), and subsequently passed an Ordinance Regulating Adult Entertainment Establishments on June 11, 1996 (hereinafter "the Ordinance"). (R-101-126).

Café Erotica brought an action in the Superior Court of Peach County, Georgia, to enjoin the enforcement of this Ordinance. (R-4-16). Both Peach County and Café Erotica filed motions for Summary Judgment. (R-440-444; R-469-471). The Superior Court of Peach County, Georgia, granted Peach County's Motion for Summary Judgment on January 15, 1999, and denied Café Erotica's Motion. In granting Peach County's Motion, the trial court relied on the Georgia Supreme Court's ruling in *Chambers v. Peach County*, 268 Ga. 672 (1997) (*Chambers II*). (R-2181-2185).

The pertinent events preceding these events are as follows:

On March 4, 1996, in *Chambers v. Peach County*, 266 Ga. 318 (1996) (*Chambers I*), the Georgia Supreme Court struck down Peach County's then-existing adult entertainment ordinance. Specifically, the Court held that "there is no evidence that, before passing the ordinance, the Peach County Commission considered and relied upon evidence of adverse secondary effects." *Id.* at 321. Following the Georgia Supreme Court's guidance in *Chambers I*, on May 7, 1996, the Peach County Board of Commissioners conducted a hearing on adult entertainment. (R-189-241; R-437 ¶ 3). The purpose of that hearing was to "objectively evaluate the impact of adult entertainment establishments on the surrounding neighborhood and on the County in order to determine whether, in the interest of the health, safety, and welfare of the citizens of Peach County, it is necessary or desirable to adopt local legislation concerning the location and/or the regulation of adult entertainment establishments." (R-190-192; R-437,438 ¶3). At the hearing, each Commissioner had a notebook containing information relating to adult entertainment establishments. (R-437 ¶ 3, Ex. B).

The Peach County Commissioners considered studies contained in their notebooks regarding the effects of adult entertainment on other counties and municipalities, including Austin, Texas, and Garden Grove, California. (R-270-273; R-286-348; R-404-422). The Peach County Commissioners also heard testimony from law enforcement authorities concerning increased criminal activity at and surrounding adult entertainment establishments in Peach County. A transcript was made of the hearing, and was made a part

of the record on appeal. (R-437 ¶ 3). Café Erotica did not present the opinions of its expert, Bruce B. McLaughlin, which it offered in support of its arguments on appeal to the Georgia Supreme Court and in this Petition, to the Commissioners for their consideration at the May 7, 1996 hearing before the County Commissioners. No representative of Café Erotica sought to question any of the witnesses who testified at that hearing about the effects of adult entertainment.

On June 11, 1996, Peach County passed a new ordinance regulating adult entertainment, the Ordinance that is being challenged in this case. (R-101-126) Among other things, the Ordinance prohibits the sale or consumption of beer and wine at business establishments where adult entertainment occurs. A copy of the Ordinance is set forth in Appendix D to the Petition for Writ of Certiorari. The Ordinance provides that: "No adult entertainment establishment licensee shall serve, sell, distribute or suffer the consumption or possession of any alcoholic beverages, malt beverages or wine or controlled substance upon the premises of the licensee."

REASONS FOR DENYING THE WRIT

In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955), this Court discussed the dimensions of its discretionary review and why cases, such as this one, are not among those for which such review should be granted:

> [W]e have considered anew whether this case is one in which "there are special and important reasons" for granting the writ of certiorari. . . .
>
> . . .

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic. This is especially true where issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

Id.

Petitioner does not reference Rule 10 of this Court's Rules in its pleading, but it appears Petitioner is seeking review under Rule 10(c). Petitioner appears to be arguing that the Georgia Supreme Court has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Response to Petitioner's Question 1 (Argument Headings I, III, and VI).[1]

I. The Georgia Supreme Court properly upheld the Peach County, Georgia, Ordinance Regulating Adult Entertainment Establishments pursuant to the clearly defined standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

Petitioner's argument under argument heading I that this Court has not yet announced a clearly defined standard for the review of a legislative enactment that seeks to regulate adult entertainment overlooks this Court's decision in *City of Erie v. PAP's A.M., TDBA "KANDYLAND"*, __ U.S. __, 120 S. Ct. 1382, 1391 (2000), which reiterated the standard of review of an ordinance that regulates adult entertainment. In *PAP's*, this Court stated that "[i]f the governmental purpose in enacting a regulation is unrelated to the suppression of expression, then the regulation need only satisfy the 'less stringent' standard from *O'Brien* for evaluating restrictions on symbolic speech." *Id.* at 1391. Pursuant to this Court's decision in *United States v. O'Brien*,

> a government regulation is sufficiently justified if it is within the constitutional power of the

---

1. Petitioner's "Questions Presented" do not match the headings set forth in the Petition. The first question set forth by Petitioner appears to correspond to argument headings I, III, and VI set forth in the Petition. The second question set forth by Petitioner appears to correspond to argument headings II, IV, and V set forth in the Petition. The third question presented does not appear to correlate to any of the argument headings in the Petition and instead is simply an inflammatory rhetorical question. Respondent has responded to the Questions presented and arguments advanced by Petitioner, as correlated in this footnote.

> Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968).

In this case, the Georgia Supreme Court analyzed the Ordinance under the test set forth in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (1982). *Café Erotica v. Peach County*, 272 Ga. 47, 48 (2000). The *Paramount* test requires that the ordinance must (1) further an important government interest, (2) be unrelated to the suppression of speech, and (3) restrict speech no more than necessary to further the government interest. *Paramount*, 250 Ga. at 256 (citing *United States v. O'Brien*, 391 U.S. U.S. 367, 377 (1968). The *Paramount* test utilized by the Georgia Supreme Court is the functional equivalent of the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

In argument heading number III, Petitioner asserts that the Georgia Supreme Court was unable to formulate a clear standard for the trial court. In upholding the constitutionality of the Ordinance, the Georgia Supreme Court held that "[t]he trial court properly followed our holding in *Chambers II* [*Chambers v. Peach County*, 268 Ga. 672 (1997)] where we found that the ordinance in question was content-neutral and analyzed the constitutionality of the ordinance in question using the three-pronged test outlined in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252 (1982)." *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000). In *Chambers II*, The

Georgia Supreme Court observed the following regarding Peach County's Ordinance Regulating Adult Entertainment Establishments:

> 2. The new ordinance is designed to combat the undesirable secondary effects of sexually explicit businesses. **In enacting the new ordinance, the county commission considered and relied upon evidence reasonably believed to be relevant to the problem**: they heard testimony interpreting studies of other cities' experience with adult entertainment, which studies showed that areas near adult entertainment establishments suffered a decrease in residential property values and an increase in crime, especially sex-related activity. A GBI drug and vice investigator testified that the number of illegal drug and vice complaints at the two Peach County clubs offering adult entertainment far exceeded the number of complaints received from any other business in 33 middle-Georgia counties, and the Peach County sheriff testified to increased criminal activity at the two clubs and at businesses located near them. *Compare Chambers v. Peach County*, supra, 266 Ga. 318 (1-3).
>
> Since **the new ordinance is designed to combat the undesirable secondary effects of sexually explicit businesses, it is content-neutral** and is put to the three-pronged test enunciated in *Paramount Pictures v. Busbee*, 250 Ga. 252 (1) (297 S.E.2d 250) (1982), for content-neutral legislation. *Chambers v. Peach County*, supra, 266 Ga. at 319. **The ordinance in question**

> **meets the Paramount criteria** in that it furthers important governmental interests (the reduction of crime and the protection of property values) which interests are unrelated to the suppression of speech, and the incidental restriction of speech is no greater than necessary to further the governmental interests. *Quetgles v. City of Columbus*, 268 Ga. 619(2) (491 S.E.2d 778) (1997).

Chambers II, 268 Ga. at 673-74 (emphasis added). The Georgia Supreme Court concluded that "Café Erotica presents no new evidence or arguments that would give us cause to depart from our holding in *Chambers II*." *Café Erotica*, 272 Ga. at 48. Contrary to Petitioner's arguments, the Georgia Supreme Court has formulated a clear standard for the trial court, that standard was applied in this case, and it is consistent with the standard set forth by this Court in *O'Brien*.

It is incorrect to contend that the Georgia Supreme Court in this case has decided an important question of federal law that has not been, but should be, decided by this Court. This Court, in *PAP's*, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *O'Brien*, has set forth the standard to be used when the governmental purpose in enacting an ordinance is unrelated to the suppression of expression, and the Georgia Supreme Court's decision in *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000) is consistent with those decisions.

Under argument heading VI, Petitioner contends that the Eleventh Circuit has struggled over what standards are applicable to scrutiny of ordinances designed to combat the

negative secondary effects of adult entertainment. This argument is not relevant to the matters within the scope of Supreme Court Rule 10(c). Nor does this argument address the question whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals." Sup. Ct. R. 10(b). The Eleventh Circuit clearly held in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, __ U.S. __, 120 S. Ct. 1553 (2000), that the *O'Brien* test is the applicable standard for reviewing ordinances such as Peach County's Ordinance. The Georgia Supreme Court's decision in *Café Erotica, Inc. v. Peach County*, 272 Ga. 47, 48 (2000) does not decide an important federal question in a way that conflicts with the Eleventh Circuit Court of Appeals' decision in *Sammy's*, and Petitioner does not argue that any such conflict exists. Sup. Ct. R. 10(b).

Response to Questions Presented 2
(Argument Headings II, IV, and V).

II. The Georgia Supreme Court properly held that Peach County had a reasonable basis for its belief that the harm to be protected against in fact exists.

Rule 10 provides that "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite the instruction of Rule 10, Petitioner urges this Court to grant certiorari "to allow the strong factual challenge to the Myth of Secondary Effects to be heard." (Petition, p. 15). When reduced to its essence, Petitioner's argument is a factual argument. Petitioner argues that unlike this Court's recent decision in *PAP's*, in this case

there is "no evidence of negative secondary effects in Peach County or in any other locale or jurisdiction." (Petition, p. 17).

Not only does Petitioner assert that this Court should grant a writ because of an asserted erroneous factual finding by the court below, Petitioner also seeks to undermine the holdings of numerous cases by way of an affidavit from its "expert." Petitioner asserts that the precedential value of this Court's prior decisions in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) is lacking, because its expert has reviewed the record before the Court in *Young*, and "found it 'difficult to imagine how the entire concept of "adverse secondary effects" of adult uses became accepted as "fact." ' " (Petition, p. 16).

Petitioner's attempt to use an after-the-fact expert to opine the "true facts" behind this Court's previous decisions is simply an effort to avoid precedent. But as the United States Court of Appeals for the Eleventh Circuit stated, "[f]or determining whether a previous case provides controlling precedent in a case before the court, the legal strategies and underlying circumstances of the earlier case are less important than the language and holding of the previous decision, and its applicability to the facts of the case before the court." *David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1332 (11th Cir. 2000). Petitioner's effort is also contrary to the principal purposes of stare decisis, which are to protect reliance interests and to foster stability in the law. *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 70 (1993) (Scalia, J., concurring).

Petitioner contends that because there were no problems associated with Café Erotica or Neon Cowboy, there is no evidence of any "problem" in Peach County to be addressed by the Ordinance. Petitioner also argues that because its expert has opined that no studies support the conclusion that adult entertainment causes negative secondary effects, there is no basis upon which a reasonable person could conclude that negative secondary effects exist. Whether the adverse secondary effects of adult entertainment, or adult entertainment in combination with alcohol, have yet been visited upon Peach County, or whether a reasonable person involved in land use planning could conclude that adult entertainment causes negative secondary effects, however, are not controlling to the question whether Peach County constitutionally enacted its Ordinance. The relevant question is whether the local governing body had a reasonable basis for its belief that the harm to be protected against in facts exists. State and federal precedents support the conclusion that Peach County did have such a basis when it enacted the Ordinance.

It is settled under Geogia law that local governments are entitled to rely on studies conducted by other counties and municipalities in enacting ordinances regulating adult entertainment. In *Quetgles v. City of Columbus*, 268 Ga. 619 (1997) (*Quetgles II*), the appellant contended that the city had not presented evidence of the negative secondary effects associated with private lingerie modeling businesses to justify its asserted interest in crime prevention and protecting property values. The Georgia Supreme Court rejected the appellant's argument, stating that "we have stated that the City need only prove it considered specific evidence of the negative secondary effects of adult entertainment businesses which it reasonably believed to be relevant to the interest

motivating the ordinance." *Quetgles II*, 268 Ga. at 620. The Georgia Supreme Court held that the studies and evidence relied upon in *Quetgles II*, the same studies declared insufficient by Café Erotica's retained expert in the present case, were "sufficient to support the City Council's interest in protecting property values and preventing criminal activity in areas near the one-on-one lingerie modeling shops." *Id. See also Parker v. Whitfield County*, 265 Ga. 829 (1995); *World Famous Dudley's Food & Spirits, Inc. v. City of College Park*, 265 Ga. 618 (1995); *Club Southern Burlesque v. City of Carrollton*, 265 Ga. 528, 530 (1995); *Gravely v. Bacon*, 263 Ga. 203 (1993).

Previous decisions of this Court and the Eleventh Circuit also make clear that a local government need not await the localized effects of adult entertainment before it acts. In *City of Renton v. Playtime Theatres, Inc.*, 501 U.S. 560 (1986), this Court made clear that a local government need not have firsthand experience of the adverse secondary effects of activities containing an expressive component protected by the First Amendment in order to justify regulation of these activities. In *Renton*, this Court considered a First Amendment challenge to an ordinance regulating the location of adult movie theaters. To justify its ordinance, in order to show that it was "designed to serve a substantial government interest," *Renton*, 475 U.S. at 50, the city was not required to consider evidence "specifically relating to 'the particular problems or needs of Renton' ", *id.*, but was "entitled to rely on the experiences of . . . other cities" as well as findings summarized in a prior Washington state opinion. *Renton*, 475 U.S. at 51. This Court held that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever

evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991), in a plurality decision, this Court rejected a First Amendment challenge to the enforcement against nude dancing establishments of Indiana's law prohibiting public nudity. As Justice Souter stated in his concurring opinion, the Supreme Court in *Renton* recognized "that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects. . . ." *Barnes*, 501 U.S. at 584.

More recently, in *PAP's*, this Court held that "[b]ecause the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *California v. LaRue*, 409 U.S. 109 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood." *PAP's*, __U.S. at __, 120 S. Ct. at 1395.

In *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157, 1162-63 (11th Cir. 1991), *cert. denied*, 503 U.S. 920 (1992), the Eleventh Circuit rejected the argument of the adult entertainment business that evidence in the record showed that it had not, in fact, caused any adverse effects on surrounding property values and that property values had actually increased at a higher

rate than before the opening of the establishment as holding "no weight." 941 F.2d at 1163. Said the court, "[i]f the decision [to regulate the adult business] was valid ex ante, International Eateries cannot justify violating the ordinances by showing they were unwise ex post." *Id.*

The Eleventh Circuit recently made clear that evidence relating to "the particular problems or needs of . . . [Peach County]", *Renton*, 475 U.S. at 50, is not necessary under the First Amendment to show that the Ordinance serves a substantial government interest. In *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.2d 993, 997 (11th Cir. 1998), the Eleventh Circuit determined that "the experience of other cities, studies done in other cities, case law reciting findings on the issue, as well as their own wisdom and common sense" are sufficient to establish that a local government has a "reasonable basis" for enacting regulations to serve a substantial governmental interest. Controlling decisions of the United States Supreme Court and this Court, and persuasive opinions of the Eleventh Circuit demonstrate the fatal flaws in Petitioner's arguments.

Like the Mobile ordinance in *Sammy's*, the Peach County Adult Entertainment Ordinance "does not seek to ban bars or nude dancing." *Sammy's*, 140 F.3d at 999. Rather, "[e]veryone can still buy a drink and watch nude dancing in . . . [Peach County]. They cannot, however do both in the same place." *Id.*

CONCLUSION

Petitioner asks this Court to overturn numerous prior decisions in order to impose an "unnecessarily rigid burden of proof" on local governments attempting not to ban commercial nude dancing or to interfere with its erotic message, but to regulate its adverse secondary effects. In this case, the Peach County Commissioners considered and relied not only upon studies and experience of other communities, but also upon the testimony of local law enforcement officers. This is sufficient.

The Petition for Writ of Certiorari should be denied because compelling reasons for granting the writ are wholly lacking from this case. Sup. Ct. R. 10. The Georgia Supreme Court evaluated the Ordinance under appropriate constitutional standards, based on the facts as presented in the record, and no basis in law or fact exists for this Court to revisit the ruling of the Georgia Supreme Court.

Accordingly, Respondents pray that the certiorari petition be denied.

Respectfully submitted,

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